Supreme Court, U. S.
FILED
FEB 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-937

WILLMAR POULTRY COMPANY, PETERSON-BIDDICK COMPANY, and LYNN M. TOMPT, On behalf of themselves and all others similarly situated,

Petitioners.

vs.

MORTON-NORWICH PRODUCTS, INC., RICHARDSON-MERRELL, INC., et al.,

Respondents.

PETITIONERS' REPLY BRIEF

COCHRANE & BRESNAHAN
By John A. Cochrane
John E. Thomas
Suite 500
Cochrane & Bresnahan Bldg.
Building
360 Wabasha
Saint Paul, Minnesota 55102
612/298-1950
Attorneys for Petitioners

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
NEW EVIDENCE OF SALES AFTER DECEMBER 31, 1969	2
RICHARDSON NOW RECOGNIZES PLAINTIFFS' "BORDER WATCH" ORAL ARGUMENT OF SEPTEMBER 18, 1974	2
NOWHERE HAS RICHARDSON DENIED ITS PARTICIPATION IN THE BORDER WATCH AFTER DECEMBER 31, 1969, AND NOW CONCEDES SUCH ACTIVITY	3
RICHARDSON "BORDER WATCH" DISCOVERY NOW ORDERED FROM NORWICH IN SUIT I	3
PLAINTIFFS' RULE 56 (1) AFFIDAVITS CONCERNED "CONSPIRATORIAL" FACTS	4
PLAINTIFFS USED FRAUDULENT CONCEALMENT ONLY TO EXTEND DAMAGES	4
JUSTICE DEPARTMENT DID NOT CHALLENGE CANADIAN NORWICH	5
DENIAL OF CERTIORARI IN POSTER EXCHANGE SUPPORTS PLAINTIFFS	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	PAGE
Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962)	3, 4, 5, 6
Poster Exchange Inc. v. National Screen Service Corp., 517 F.2d 117 (5th Cir., 1975); No. 75-667, October Term, 1975	5
U. S. v. Gorham, 523 F.2d 1088 (C.D.C. 11/75)	4

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-937

WILLMAR POULTRY COMPANY, PETERSON-BIDDICK COMPANY, and LYNN M. TOMPT, On behalf of themselves and all others similarly situated,

Petitioners,

vs.

MORTON-NORWICH PRODUCTS, INC., RICHARDSON-MERRELL, INC., et al.,

Respondents.

PETITIONERS' REPLY BRIEF

INTRODUCTION

Plaintiffs are now able to factually pierce the December 31, 1969, expiration date of the distributorship agreement between Richardson and Norwich. The defendants have so far been successful in hiding behind both the distributorship agreement and the Tariff Commission report. Ironically, plaintiffs' thrust does not concern those directly but, instead is aimed at the conspiratorial/monopolistic exclusion of the cheaper Canadian Norwich product. Defendants have been able to divert the attention of the lower courts away from this

to center on the agreement and the report. In reply a few key points must be made to matters first raised in the Richardson brief, or other intervening matter.

NEW EVIDENCE OF SALES AFTER DECEMBER 31, 1969

It is incredible that the Richardson brief discloses *for the first time* that it made some *sales* after December 31, 1969. (R. Br. p. 9) This flies in the face of the Eighth Circuit's reliance that "Richardson had *not made any sales* of furazolidone *to anyone after December 31, 1969*" (Pet. App. A-5) (emphasis added). Richardson now tries to brush this under the carpet (R. Br. p. 13, asterisk) by saying it made the sales in competition with Norwich but that only shows Richardson then would have had a heightened interest in excluding the cheaper Canadian Norwich product from the market.

RICHARDSON NOW RECOGNIZES PLAINTIFFS' "BORDER WATCH" ORAL ARGUMENT OF SEPTEMBER 18, 1974

For the first time, Richardson concedes that plaintiffs' did raise the "border watch" during oral argument September 18, 1974, of the motion (R. Br. 12, asterisk). However, Richardson now feebly attempts to explain it away by confusedly saying that it was raised for the first time during oral argument October 17, 1974, for reconsideration (R. Br. 11), as to activity after December 31, 1969. That is not true because plaintiffs' counsel said on September 18, 1974, in referring directly to Richardson that "somebody *continued* that border watch" (Pet. Br. p. 8) (emphasis added). It could not have been made more clear or with more force. Yet, as late as the December 22, 1975, order of the same district court in Suit II plaintiffs are still accused of having "stood silently by"

in Suit I (Pet. Br. 26). The lower courts have simply overlooked the clear record and plaintiffs and the class should not have to suffer for it.

NOWHERE HAS RICHARDSON DENIED ITS PARTICIPATION IN THE BORDER WATCH AFTER DECEMBER 31, 1969 AND NOW CONCEDES SUCH ACTIVITY

The entire record is devoid of any such denial. Significantly Richardson now raises the argument that even if it did engage in a border watch after December 31, 1969 that:

> "the importation of furozolidone was in any event prohibited during *this period* by the Presidential exclusion order (see P. 7 *supra*)." (R. Br. 19) (emphasis added)

That of course bears on the *liability* for such activity after December 31, 1969, i.e., merits, a question to be reached at trial. Richardson never argued this by oral argument or brief before the district court or the Eighth Circuit. This alone, should be enough for this Court to remand for proceeding in accordance with the rule of *Poller*.

RICHARDSON "BORDER WATCH" DISCOVERY NOW ORDERED FROM NORWICH IN SUIT I

At the time of filing Suit II (August, 1975) and serving specific "border watch" discovery against Richardson, similar interrogatories and document requests were served on Norwich in Suit I. The Order of the district court dated December 24, 1975, allowing such "border watch" discovery against Norwich but as it relates to Richardson after December 31, 1969, is printed herein as an Appendix. A key sentence of the court's Memorandum bears repeating here for it recognizes that the *conspiracy* issue as to *Richardson after* December 31, 1969,

is indeed alive but now only as it can bear on the liability of Norwich. The court said:

> "The Court cannot say at this time that the issues of *conspiracy* are necessarily irrelevant to establishing the possibility of liability of Morton-Norwich." (emphasis added)

It is up to this Court to make the conspiracy issue once again relevant to the liability of Richardson. The discovery requests have not been responded to by Norwich as of the date of this writing although ordered December 24, 1975.

PLAINTIFFS' RULE 56 (1) AFFIDAVITS CONCERNED "CONSPIRATORIAL" FACTS

Richardson attempts to avoid the "Catch 22" by now saying that plaintiffs failed to state the "nature of the facts" (R. Br. 11) yet Richardson quotes from the affidavits the phrase, "*conspiratorial* defendants" (R. Br. 10) (emphasis added). The word "conspiratorial" speaks for itself, i.e., facts of involvement in the conspiracy. A conspiracy is secretive by its very nature. See *Poller* as quoted in Petitioners' Brief (Pet. Br. A-5) and *U. S. v. Gorham*, 523 F. 2d 1088, 1093 (C.D.C. 11/75) stating such in footnote 6 and requiring less particular pleadings and proof even in that criminal case.

PLAINTIFFS USED FRAUDULENT CONCEALMENT ONLY TO EXTEND DAMAGES

Richardson now incompletely says plaintiffs used this to avoid the four-year statute of limitations (R. Br. p. 5). That is true but only in so far as it was an attempt to extend the four year *damage* period. It was not used as an attempt to reach back for liability of Richardson since continuing liability of Richardson was alleged.

JUSTICE DEPARTMENT DID NOT CHALLENGE CANADIAN NORWICH

Richardson now says it is significant that the Justice Department determined not to sue because of the expiration of the distributorship agreement (R. Br. 19, asterisk). *Nowhere* did the Justice Department challenge the Canadian Norwich subsidiary relationship which is the thrust of this suit but instead the government centered entirely on the exclusive distribution agreement.

DENIAL OF CERTIORARI IN POSTER EXCHANGE SUPPORTS PLAINTIFFS

The recent denial, January 12, 1976, by this Court of the Petition for Certiorari in *Poster Exchange, Inc. v. National Screen Service*, No. 75-667, October Term, 1975, (cited Pet. Br. 11) is supportive of plaintiffs' here because there the Fifth Circuit had complied with the mandate of *Poller* by a remand to first afford the plaintiff in that lengthy proceeding an even further opportunity to present any specific *act or word* within the time period, 517 F.2d 117, at 129.

CONCLUSION

If the mandate of *Poller* is not given effect here then antitrust pleading and argument has degenerated to demurrer-type haggling over words such as "continued" and "conspiratorial." If *Poller* had been heeded, the plaintiffs would have been afforded discovery and this important class action antitrust case, filed June 7, 1974, would long ago have moved on its course and ripened for disposition.

Dated: February , 1976.

Respectfully requested,

COCHRANE & BRESNAHAN
By John A. Cochrane
John E. Thomas
Suite 500
Cochrane & Bresnahan Bldg.
360 Wabasha
St. Paul, Minnesota 55102
612/298-1950
Attorneys for Petitioners

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74-Civ. 276

WILLMAR POULTRY COMPANY, et al.,
Plaintiffs,

vs.

MORTON-NORWICH PRODUCTS, INC.,
Defendant.

MEMORANDUM ORDER

On October 2, 1975, oral argument was held in the separate but related case of *Willmar Poultry Co., et al. v. Richardson-Merrell, Inc.*, No. 4-75-Civil 413 (hereafter "Suit 2"). During that argument defendant in this case (hereafter "Suit 1") presented an oral motion relating to discovery demands by the plaintiffs herein. Plaintiffs have acquiesced in the presentation of the motion by this procedure, and pursuant to Rule 7 (b)(1) the Court has considered defendant's oral motion.

Defendant objects that interrogatories and document requests served by plaintiff on August 26, 1975, are irrelevant. Defendant characterizes its objection as unusual, being based on a legal rather than a factual ground. Defendant points out that all the discovery requests objected to are virtually identical to contemporaneous requests made of Richardson-Merrell, Inc. (hereafter "RMI") in Suit 2. The discovery ini-

tiated in both suits primarily seeks information regarding an alleged conspiracy between RMI and Morton-Norwich Products, Inc. (hereafter "Morton-Norwich"). Morton-Norwich claims that since RMI has been dismissed from Suit 1, there is no longer any issue of conspiracy in Suit 1, and discovery requests directed to such a conspiracy can have no bearing on this lawsuit. Morton-Norwich seeks essentially a clarification of the parameters within which this case shall proceed and seeks a determination from the Court that questions of an RMI/Morton-Norwich conspiracy are now beyond the pale.

The Court does not believe that such a determination is appropriate at this time. Since RMI has been dismissed, it, of course, cannot be liable for conspiracy. However, the theories of recovery asserted against Morton-Norwich seem to include both patent misuse and monopolization. The Court cannot say at this time that the issues of conspiracy are necessarily irrelevant to establishing the possible liability of Morton-Norwich.

The timing and the similarity of the discovery requests in Suit 1 and Suit 2 do suggest, however, that the information sought from Morton-Norwich was needed not to establish the liability of Morton-Norwich but to demonstrate liability as to RMI alone. Since RMI has been dismissed from Suit 1, and since the Court has entered final judgment in Suit 2 dismissing that case on the ground of *res judicata*, it may be that plaintiffs no longer need or want much of the information they have demanded. Since some of the discovery matters request information which is as much as 20 years old, and since it may be quite burdensome for defendant to search out such information, the Court believes it appropriate to follow defendant's alternative suggestion that its obligation to answer at this time be limited to more recent matters. The imposition of this

limitation is based on the Court's uncertainty whether plaintiffs continue to desire all the discovery demanded, and on the possibility that production of information might be burdensome.

Defendant suggests that its obligation to answer be limited to the statutory period, beginning June 7, 1970. Plaintiffs seek to extend this period back until December 31, 1969, the date upon which defendant's exclusive distributorship arrangement with Hess & Clark expired. This seems a reasonable request. It may be important in this lawsuit for plaintiffs to know what steps Morton-Norwich took as it begain marketing furazolidone itself rather than through Hess & Clark.

Accordingly, upon all the files, records and proceedings herein,

IT IS ORDERED:

1. That at this time defendant's objections to plaintiffs' Interrogatories (Second Set) and plaintiffs' Request for Production of Documents, both of which were served by mail on August 26, 1975, and filed August 27, 1975, are sustained as to all documents and information prior to December 31, 1969; and that defendant's said objections are denied to all documents or information from and after December 31, 1969.

2. That no costs be taxed.

EARL R. LARSON
United States District Judge

December 24, 1975.